**27th Annual Miller du Toit Cloete Inc/University of the Western Cape Family Law Conference**

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# RESOLVING AUSTRALIAN EMBRYO DISPUTES

**STEPHEN PAGE**

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*"When married couples turn to this technology and later divorce, IVF can present a host of legal dilemmas, including how to resolve disagreements over the disposition of cryogenically preserved pre-embryos that remain at the time of dissolution."*

Colorado Supreme Court in *Rooks* [2018]

## USEFUL CHECKLIST

1. For every client who is coming to you about property settlement, ALWAYS ASK if there are any eggs, sperm or embryos in storage.

2. Where are the embryos stored?

3. If they have children, and parenting issues may be in dispute, ALWAYS ASK how their children were conceived.

4. Who is the name of the client with the IVF clinic? It may be only one of the parties, not both. Typically, the woman whose eggs are used will be named as patient, and the spouse or partner will be named as partner.

5. Always check the consent forms for the clinic. The forms may not have been properly executed, or may mandate disposal of the embryo, or be silent on the issue.

6. Is the matter one that is agreed or contested?

7. In what state or territory do the parties reside?

8. The court is not going to force someone to become a parent when they don't want to be (whether they will be recognised as a lawful parent or not).

9. The court has the ability to make injunctions to enable one of the parties to use the embryos if there is no prejudice to the other party.

10. The court will be concerned about whether the other party will be a parent under the *Family Law Act*.

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[1] Stephen Page is a father through surrogacy and known egg donation. He is a legal practice director of Page Provan Pty Ltd. Stephen was admitted as a solicitor in 1987. He has been an Accredited Queensland Law Society Family Law Specialist since 1996. He is a Fellow of the International Academy of Family Lawyers and of the Academy of Adoption Assisted Reproduction Attorneys. Stephen is an international representative on the ART Committee of the Family Law Section of the American Bar Association. He is the Secretary of the Fertility Society of Australia and New Zealand. Stephen received the inaugural Pride in Law Award (2020) and the Queensland Law Society President's Medal (2023). He is the author of *When Not If: Surrogacy for Australians* (2022), and *International Assisted Reproductive Technology*, American Bar Asssociation (2024).

11. The court will be concerned about whether treatment can occur if the court makes an order.

12. There are different ways to resolve ownership and use of embryos, the most efficient of which can be a written agreement between the parties.

13. The client whose eggs were used for the creation of the embryos should always be asked:

    a) Do you want to become a parent? If not, is there a point to this dispute? There is always an assumption that the solution to a problem is to do *something*, while sometimes the solution is to do *nothing*.

    b) Can you create other embryos? It may be a lot cheaper, quicker and simpler than a protracted dispute about ownership.

**BEGIN AT THE BEGINNING**

It's rare that intended parents come to lawyers before they create embryos - but if they do, remember this piece of advice: do not rely on the IVF clinic's forms as the basis of any future planning.

Provided you know what you are doing, and the issues for the clinics have been met (typically those matters they are required by their regulation to cover), there is nothing to stop you drafting the consents of the parties as to treatment, and in particular to the storage of gametes of embryos. Gametes are eggs and sperm. Of course, as our insurer keeps telling us, only do work for which you have expertise.

**Nick Loeb v. Sofia Vergara**

Your clients, too, could be in the nightmare case like Hollywood director Nick Loeb and his ex, *Modern Family* actress Sofia Vergara.

They first met in 2010. In 2013, as a couple, they created two embryos at the ART Reproduction Center in Beverly Hills with the intent of creating biological children to be carried to term by a gestational surrogate. They entered into a surrogacy agreement with a friend and employee of Vergara to be their surrogate.

They tried twice to implant embryos into the surrogacy- but failed both times.

In 2013 they looked at undertaking surrogacy with someone else. They underwent further IVF, during which time two more embryos were created. Their consent form, called a Directive, stated that neither could use the embryos without the other's consent.

The form provided three options for the embryos in the event of the death of either Vergara or Loeb:

(1) donate the embryos to research;

(2) thaw the embryos with no further action; or

(3) if one party died, allow the embryos to be used in a living partner.

Loeb asserted that Vergara forced him to choose option number two.

As they had not yet chosen a surrogate, the embryos were cryopreserved at the clinic.

In 2014 the couple called off their engagement.

By 2015, Loeb commenced proceedings in California to use two embryos that were in storage so that he could become a dad through surrogacy. Loeb discontinued the proceedings in California when he did not want to disclose the identities of former girlfriends who were pregnant with his children and had undergone abortions.

Loeb commenced proceedings in Louisiana, where officials consider embryos to be human beings. In Louisiana, therefore Vergara was sued by the two embryos! They were named Emma and Isabella and listed as plaintiffs. The pleadings stated:

> *"Emma and Isabella seek that they be entrusted to their natural father Loeb, who is willing and desirous that they be born."*

In his claim, Loeb sought:

- a declaratory judgment declaring the Directive a void and unenforceable contract between Loeb and Vergara;
- a declaratory judgment declaring that the Directive does not control decisions regarding the future and disposition of Emma and Isabella;
- rescission of the Directive due to duress; rescission of the general informed consent as against public policy;
- rescission of the Directive due to fraud and misrepresentation;
- a declaratory judgment prohibiting consent to the destruction and death of Emma and Isabella;
- mandating Vergara release Emma and Isabella for uterine transfer, continued development, and live birth;
- breach of oral contract; tortious interference with inheritance; appointment of Loeb as curator of Emma and Isabella;
- a declaration of Ms. Vergara as an egg donor with regard to Emma and Isabella; and
- termination of Ms. Vergara's parental rights with regard to Emma and Isabella.

In 2017 Vergara then brought proceedings in California seeking to restrain Loeb. She was successful. The embryos could not be used without the consent of both parties.

During the course of the proceedings, which were numerous, Loeb became the director of the film *Roe v Wade*, which he happily publicised, as well as publicising his court cases.

After his loss in California, Loeb said:

> *"It's sad that Sofia, a devout Catholic, would intentionally create babies just to kill them."*

The proceedings were finally dismissed on appeal in 2021 when the Louisiana appeals court found that the proceedings made a mockery of the Louisiana legal system, and that Loeb and one of his attorneys had *"blatantly engaged in forum shopping."*[2]

## THE PROFESSIONAL INDEMNITY QUESTION

For most family lawyers, a discussion about embryos is entirely esoteric. Who cares whether or not embryos are property? What does it have anything to do with family law?

I would put it this way - it is a potential professional indemnity issue. According to Monica Mazzei[3], a family lawyer at Sideman & Bancroft, who represents high net worth clients in Silicon Valley:

> *"It's so common that now it's a routine question that I have to ask: Is there any genetic material that we need to talk about?"*

In the most recent year reported, 2022, 41,295 embryos were transferred in Australia and New Zealand following embryo implantation, resulting in 5,700 births. As best can be calculated, about 5,300 of those were in Australia.

### Don't assume

It is necessary to ask clients how their children were conceived. Do not assume that the children were conceived naturally. I have seen a number of cases where the lawyer did not ask - and assumed that one or both parties were parents as a matter of law, when they were not. Of course, if someone is not a parent, the then various presumptions under the *Family Law Act 1975* do not apply - and the party may not have standing in parenting matters, unless they can show that they are someone concerned with the care, welfare and development of the child under s.65C(c).

It is necessary to ask, in your initial consultation or client questionnaire, if the parties have any sperm, eggs or embryos, as part of the checklist of property. There are two reasons why.

The first is that if your client wishes to become a parent again, or indeed a parent for the first time. It may be that the only reasonable, cost efficient way (and sometimes *only* way in which their genetics can be used) is by use of that sperm, eggs or embryos that are already in storage. If you have not taken steps to enable them to use that sperm, eggs or embryos – or, worse, impeded them from doing so - your client might be prevented from doing so. Self-evidently, your former client might be seeking to make your responsible for their loss.

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[2] The judgment of the Court of Appeal can be found here: https://www.courthousenews.com/wp-content/uploads/2021/01/embryobattle.pdf viewed 7 March 2022.

[3] *"The Latest Issue in Divorces: Who Gets the Embryos?"*, *The New York Times* 3 April 2021, viewed 7 March 2022: https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html .

The second is if there are embryos and the parties have separated, there is the possibility of fraud. As set out below, there have been a number of cases both here and overseas where desperate mums to be have forged their ex-husband's signatures. Of course, the possibility of fraud is not limited to opposite sex relationships. If you learn that your client and their ex have a number of embryos, then you need to ask if they want to be a parent again. Your client might be the driving force to be a parent. By contrast, your client may not want to be a parent (again), or might be happy for the ex to be a parent provided that there is no ongoing responsibility by your client to the child (including, of course, child support).

If you learn that your client **DOES** want to be a parent, then you need to turn your mind to three things:

1. **Is there agreement between the parties on that point?** If not, what are the barriers? What steps can be taken to assist in reaching agreement - and conversely, what steps can be taken to remove those barriers?

2. **Who will be a parent of the child when it is born?** Often the barrier for the other party is a fear that they will be a parent, and have parental responsibility- especially 18 years of child support. It is important to know the law about who is a parent, which I discuss in part below. If the other side are fearful of this, address it plainly - if necessary by a letter setting out the law as you understand it. If you are wrong, the other side will usually quickly tell you so. When writing a letter of this kind, it is necessary to go through, painfully, every step in legislation or case law. Skipping through this leads to errors. No shortcuts! As I said above, don't assume. Work off first principles, no matter how many times you have done it before. It is essential to be meticulous.

3. **What are the ways in which the deal between them can be documented?** I cover this below.

If the other party is seriously ill, and your client is of the view that there is a chance that the other party might die, then urgent steps may need to be put in place to enable use of the other party's gametes, or embryos created from those gametes after their death. Specialist advice should be called in as soon as possible. I have acted in a number of cases where widows did not believe that their husbands were going to die - but did.

If you learn that your client **DOES NOT** want to be a parent, then the first thing that should be done is to obtain a copy of any consents executed with the clinic. Usually these can be obtained quickly by you under authority from the client or by the client direct. I have not seen any great delays by IVF clinics providing this information. Have a read of the consents. As seen in some of the examples, sometimes there are gaps in what the consents say or don't say.

Once you have had a chance to read them, then send a letter from your client to the IVF clinic and the treating doctor saying clearly that they do not consent to further treatment. If your client changes their mind, that refusal can be revoked, and if necessary, a letter from you or court order or agreement, or statutory declaration by your client to explain the change in their position.

And of course, in both cases, whether your client wants to have more children or not, you should be checking if your client has a Will - and if they don't (or at least one that reflects their current outlook) rectifying that as quickly as you can. There should be provision in the Will about what they want done with the gametes or embryos.

**Example: Goldilocks and Rapunzel**

Goldilocks and Rapunzel are in a de facto relationship. They decide to have children. They go to the Wonderful IVF clinic in Sydney, and choose an anonymous, clinic recruited sperm donor. Sperm is set aside for both of them. The plan is to have a child each, but with the two children being genetically related to each other as siblings, through the same sperm donor.

Goldilocks goes first. A number of embryos are created using her eggs and the donor sperm. She undergoes a number of IVF cycles. Eventually she falls pregnant. There are no embryos left. Goldilocks gives birth to a boy, Prince.

Goldilocks and Rapunzel split up. Property settlement orders are made by consent. Rapunzel buys Goldilocks out of their home - and there is a super split. A standard she keeps/she keeps order is made.

It is at this point that Rapunzel wants to try and become a mum, after the stress of the split and property settlement are out of the way. She goes to Wonderful IVF - who tell her that the sperm is jointly owned by Goldilocks and Rapunzel, and that Rapunzel cannot access the sperm without either the consent of Goldilocks or an order from the court.

Rapunzel feels let down by her family law solicitor in that this should have been covered in the deal. She told her solicitor about their plan to have a family together, including the sperm, but the solicitor was much more interested in the value of the property pool and percentages, and overlooked the sperm. Rapunzel, of course, approached Goldilocks for use of the embryos. Goldilocks tells Rapunzel that the orders as made are *"just right"*, and Goldilocks will not co-operate with Rapunzel in allowing use of the sperm.

That is why Rapunzel has come to you, a commercial litigation solicitor, to make a claim and a complaint about her family law solicitor.

**Example 2: Goldilocks and Rapunzel created embryos**

In a variation of example one, at the time that Goldilocks created embryos, so did Rapunzel, using her eggs and the donor sperm.

When Rapunzel approaches Wonderful IVF post- property settlement, seeking to use "her" embryos, she is told by the clinic that the embryos are owned by both Goldilocks and Rapunzel, and that she cannot use them without either Goldilocks' agreement or a court order. Rapunzel is enraged that the embryos cannot be used - because they are, after all, her genetic material. She has been told by doctors that she cannot produce any more eggs. Her last chance to become a mum using her genetic material is through the use of those embryos, which use has been denied her.

## WHO ARGUES ABOUT THE OWNERSHIP OF EMBRYOS?

While anyone who owns embryos jointly can argue about their ownership, experience has taught me that there are two groups who do argue about ownership:

- Separated heterosexual couples
- Separated lesbian couples.

There are slightly different dynamics with each. Typically, the person who wishes to be able to use the embryos is the woman from whose eggs the embryos were created. Often, due to her age or infertility, she is not able to create more embryos.

### Heterosexual couples

There are five issues that stand out about heterosexual couples arguing about embryos, typically where the woman wants to use the embryos, and the man does not:

1. Two words, and one period of time, that leap out to him: 18 years of child support. If he is able to be shown that he will not be a parent, and therefore will not have to pay 18 years of child support, typically, any objection then falls away. It is in her interests, typically, for him *not* to be a parent. If he is a parent, then the bundle of responsibilities also falls on him, including parental responsibility under the *Family Law Act 1975* (Cth), such as where the child is enrolled in school, medical treatment; and the need to consent to the issue of a passport under the *Australian Passports Act 2005* (Cth).

2. Occasionally, the man does not want a sibling born to existing children, with all the complexity that brings, where he is a parent to the other children, and is the biological but not legal parent to this child.

3. Occasionally, the man's sperm will not have been used for the creation of the embryos. These cases are easier to resolve, as he does not have the same genetic and psychological connection to the embryo as he may have had as the genetic father.

4. His use of the embryos as a bargaining chip, like any other, to extract a better deal for himself on property settlement, or children's issues.

5. If the man is the genetic father:

    a) Can he withdraw his consent prior to the use of the embryos?

    b) Does he need to provide consent to any proposed transfer of storage of the embryos to another clinic, or export interstate or overseas?

    c) Will he be considered a donor by the IVF clinic (notwithstanding that when the embryos were created, he was not)? If the clinic takes this view, then he will need to take part in donor counselling, and to give positive consent. Do the embryos then need to be moved to another clinic, that does not take that view? What obstacles are in place to prevent thatmove?

**Lesbian couples**

The same dynamics, except for possibly 2 and 5, apply for lesbian couples as they do for heterosexual couples. Four differences that may be manifest are:

1. Biology dictates that the other party's gametes will not have been used.

2. There may remain a desire by the other party to use the embryos because of a past desire by them to engage in reciprocal IVF (where the genetic mother's eggs are to be fertilised to be carried by the other party).

3. Their relationship may be more fluid. Some lesbian couples do not marry, as they consider that to do so is patriarchal. Their finances may be separate, although they live together[4]. They may live in separate houses, although their relationship continues[5]. There is a higher chance that only one of the parties underwent IVF, with the other remaining in the background[6].

4. There may be more than two parties in the relationship.

**REGULATORY LANDSCAPE FOR IVF CLINICS**

Embryos by their nature are stored in IVF clinics. The regulatory landscape affecting IVF clinics needs to be taken into account.

IVF clinics in Australia must, under federal, state and ACT law, be accredited with the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia and New Zealand.

Regulation is achieved principally by the accreditation of ART centres under the *Research Involving Human Embryos Act 200*2 (Cth), accreditation being required to come from the Reproductive Technology Accreditation Committee of the Fertility Society of Australia.

Section 11 provides:

> *"A person commits an offence if:*
>
> *(a) the person intentionally uses, outside the body of a woman, a human embryo:*
>
> *(i) that was created by fertilisation of a human egg by a human sperm; and*
>
> *(ii) that is not an excess ART embryo; and*
>
> *(b) the use is not for a purpose relating to the assisted reproductive technology treatment of a woman carried out by an accredited ART centre, and the person knows or is reckless as to that fact.*
>
> *Penalty: Imprisonment for 5 years."*

[4] *Chancellor & McCoy* [2016] FamCAFC 256.
[5] *Aldridge & Keaton* [2009] FamCAFC 229; *Clarence & Crisp* [2016] FamCAFC 157.
[6] *S (Children: Parentage and Jurisdiction)* [2023] EWCA Civ 897.

Section 10 provides:

> *"(1) A person commits an offence if the person intentionally uses an excess ART embryo, unless:*
>
> *(a) the use by the person is authorised by a licence; or*
>
> *(b) the use by the person is an exempt use within the meaning of subsection (2).*
>
> *Penalty: Imprisonment for 5 years.*
>
> *(2) A use of an excess ART embryo by a person is an **exempt use** for the purposes of subsection (1) if:*
>
> *(a) the use consists only of:*
>
> *(i) storage of the excess ART embryo; or*
>
> *(ii) removal of the excess ART embryo from storage; or*
>
> *(iii) transport of the excess ART embryo; or*
>
> *(b) the use consists only of observation of the excess ART embryo; or*
>
> *(c) the use consists only of allowing the excess ART embryo to succumb; or*
>
> *(d) the use is carried out by an accredited ART centre, and:*
>
> *(i) the excess ART embryo is not suitable to be placed in the body of the woman for whom it was created where the suitability of the embryo is determined only on the basis of its biological fitness for implantation; and*
> *(ii) the use forms part of diagnostic investigations conducted in connection with the assisted reproductive technology treatment of the woman for whom the excess ART embryo was created; or*
>
> *(e) the use is carried out by an accredited ART centre and is for the purposes of achieving pregnancy in a woman other than the woman for whom the excess ART embryo was created; or*
>
> *(f) the use is of a kind prescribed by the regulations for the purposes of this paragraph.*
>
> *(3) Despite subsection 13.3(3) of the Criminal Code , a defendant does not bear an evidential burden in relation to any matter in subsection (1) or (2) of this section.*
>
> *(4) In subsection (2):*

*"**diagnostic investigation**" , in relation to an excess ART embryo, means any procedure undertaken on embryos for the sole purpose of diagnostic investigations for the direct benefit of the woman for whom it was created.*

*"**observation**" , in relation to an excess ART embryo, includes taking a photograph of the embryo, or taking a recording of the embryo from which a visual image can be produced."*

Section 8 defines an *accredited ART centre*:

*"**"accredited ART centre"** means a person or body accredited to carry out assisted reproductive technology by:*

*(a) the Reproductive Technology Accreditation Committee of the Fertility Society of Australia; or*

*(b) if the regulations prescribe another body or other bodies in addition to, or instead of, the body mentioned in paragraph (a)--that other body or any of those other bodies, as the case requires."*

The regulations have not prescribed another body. In other words, in order to be able to operate an IVF clinic in Australia, one must have a licence from RTAC.

The Fertility Society of Australia in 2020 changed its name to The Fertility Society of Australia and New Zealand. It continues to have a Reproductive Technology Accreditation Committee.

*Human embryo* is defined in section 7 as meaning:

*"a discrete entity that has arisen from either:*

*(a) the first mitotic division when fertilisation of a human oocyte by a human sperm is complete; or*

*(b) any other process that initiates organised development of a biological entity with a human nuclear genome or altered human nuclear genome that has the potential to develop up to, or beyond, the stage at which the primitive streak appears."*

Each of the States and the ACT (but not the Northern Territory) has legislation that matches the Commonwealth Acts. By way of example, in Queensland the Act is the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld). Section 23 of the Queensland Act matches section 12 of the Commonwealth *Research Act*. It is similarly an offence under the Queensland Act, as it is under the Commonwealth Act, to use an excess ART embryo. The relevant exception is contained in section 23(2)(d):

*"The use is carried out by an accredited ART centre, and –*

*(i) the excess ART embryo is not suitable to be placed in the body of a woman for whom it was created whether suitability of the embryo is determined only on the basis of its biological fitness for implantation; and*

*(ii) the use forms part of diagnostic investigations conducted in connection with the assisted reproductive technology treatment of the woman for whom the excess ART embryo was created."*

*Human embryo* is defined in the dictionary to the Queensland Act as:

*"means a discrete entity that has arisen from either –*

*(a) the first mitotic division when fertilisation of a human oocyte by human sperm is complete; or*

*(b) any other process that initiates organised development of a biological entity with a human nuclear geno or altered human nuclear genome that has the potential to develop up to, or beyond, the stage at which the primitive streak appears;*

*and has not yet reached eight weeks of development since the first mitotic division."*

Section 21 of the Queensland Act provides, relevantly:

*"In this part –*

***'accredited ART centre'** means an entity accredited to carry out assisted reproductive technology by an entity prescribed under a regulation."*

Regulation 2 of the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Regulation 2015* (Qld) sets out the prescribed accrediting entity:

*"For the Act, section 21, definition*

***'accredited ART centre'**, the reproductive technology accreditation committee of The Fertility Society of Australia ACN 006 214 115 is a prescribed entity."*

In essence, both Commonwealth and State law requires an accredited ART centre or in other words –an IVF clinic– to submit to a process of self-regulation determined by RTAC.

RTAC has issued a *Code of Practice (2024),* to ensure compliance. This states at 2.3 compliance (Critical Criterion 1), relevantly:

*"The ART Unit must comply with statutory and regulatory requirements and provide evidence of:*

*(a) identification and compliance with National and State-based statutory and regulatory requirements in regard to ART treatment including: statutory storage period; donation of gametes or embryos; surrogacy; record keeping; and reporting requirements. This should be in the form of a risk assessment with clear pathways and evidence of discussion by top management, communication of any changes through documentation and staff training, and valid consent forms;*

*(d) compliance with the RTAC Code of Practice,*

*(e) compliance with any applicable national, state or territory legislation,*

*(f) records of current signed Deed of Agreement with the FSANZ,*

*(g) compliance with the NHMRC ethical guidelines on the use of ART in clinical practice and research (2007 [sic] or more recent review) or New Zealand equivalent, except where in conflict with legislation, or where alternative requirements have been directed by a registered and compliant HREC [Human Research Ethics Committee] affiliated to the unit."*

The RTAC *Code of Practice* has, in turn, incorporated into it the National Health and Medical Research Council, *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research* (2017, updated 2023). Subject to contrary statute or regulation, IVF clinics must comply with the *Ethical Guidelines*. They are in effect licensing conditions.

IVF clinics in Australia exist in a particularly complex regulatory environment. Australia has a population of 27 million, similar to Shanghai, but has come up with eight different models of regulating IVF clinics. Most IVF clinics are parts of chains that operate across state borders, resulting in them having to comply with different laws in different states.

In addition to the RTAC *Code of Practice*, IVF clinics must comply with state or territory licensing or registration in the Australian Capital Territory, New South Wales, South Australia, Western Australia and Victoria, and later this year, Queensland. Where there is a conflict between the statute or regulation, and the *Code*, the statute or regulation prevail.

Any practitioner seeking to resolve an embryo dispute must always keep an eye out for this complex regulatory environment. If it is proposed to move the embryo to another clinic or interstate, then compliance with the ability to export, and the interstate legal regime, also has to be met.

**NHMRC *ETHICAL GUIDELINES***

Paragraph 7.4 provides:

*"7.4 Manage disputes between members of a couple for whom an embryo is stored*

*7.4.1 Clinics must have clear policies for managing disputes that may arise between individuals for whom an embryo is stored.*

*7.4.2 When a dispute arises, a clinic may suspend the expiry of the period of storage specified in the consent form (see paragraph 4.6.4) at the request of either party. Such a suspension should be notified in writing to both parties and should be reviewed by the clinic every five years. Any subsequent discard of the embryos, without the consent of both parties, must be in accordance with the clinic's policy, which should have been clearly articulated to the responsible couple before the storage initially occurred."*

Too often, the policy for managing disputes between individuals for whom an embryo is stored is to have them sign a consent form which says that if they split up to let the clinic know. The consent form typically does not then state what is to be done with the embryo.

Consent forms in the past gave options to the parties to discard the embryos if they were ever to split up, as occurred in one of the reported cases. Thankfully, those forms are not used these

days. The model used, as I said, is for the parties to be obliged to tell the clinic that they have separated, but not to be the method of determining what is to happen with the embryos. That is up to the parties to determine, and if they do not agree, possibly for a court to decide.

Sometimes patients then come to family lawyers like me, seeking advice about what can be done with their embryos. Sometimes the consent forms, however inadequate, remain unsigned.

Guiding Principle 5 says:

> *"Decision-making in the clinical practice of ART must recognise and respect the autonomy of all relevant parties, promoting and supporting the notion of valid consent as a fundamental condition of the use of ART."*

Guiding Principle 7 says:

> *"Processes and policies for determining an individual's or a couple's eligibility to access ART services must be just, equitable, transparent and respectful of human dignity and the natural human rights of all persons, including the right to not be unlawfully or unreasonably discriminated against."*

Guiding Principle 9 provides:

> *"The provision of ART must be transparent and open to scrutiny, while ensuring the protection of the privacy of all individuals or couples involved in ART and persons born, to the degree that is protected by law."*

The Guidelines state on page 20:

> *"The status of the human embryo*
>
> > *There are different views held in the Australian community about the status attributed to a human embryo. To different individuals the same embryo can be seen as a living human entity in the early stage of development, potential life, or a group of cells. Some argue that the value and significance of an embryo is best determined by the individual or couple for whom it was created, based on their individual or collective set of values, preferences, and beliefs.*
> >
> > *Nevertheless, under commonwealth legislation, the human embryo <u>is</u> given a special status. The Research Involving Human Embryo Act 2002 and the Prohibition of Human Cloning for Reproduction Act 2002 regulate the creation and use of human embryos outside of the human body, providing sanctions for those who misuse embryos. The Acts and these Ethical Guidelines, recognise that the creation and use of a human embryo requires serious consideration."*

Under Guiding Principle 3.5, this is said about consent:

> *"Valid consent must be obtained from all relevant parties for each specific procedure or treatment. The process of obtaining consent for ART activities is ongoing and not a single event."*

Similarly, on page 29 under Information Counselling and Consent this is said:

> *"Valid consent must be obtained from each relevant party for each specific treatment or procedure."*

This is clarified further in paragraph 4.5.1:

> *"Clinics must ensure that valid consent for each specific procedure is obtained from all relevant parties and remains current. For consent to be valid:*
>
> - *The person giving consent must be considered to have the capacity to provide consent*
> - *The decision to consent to the treatment or procedure must be made without undue pressure*
> - *All relevant requirements regarding the provision of information and counselling requirements must be satisfied …*
> - *The consent must be specific, and is effective only in relation to the treatment or procedure for which information is being given*
> - *Consent must be sought for all training and quality assurance activities conducted on embryos, including where an embryo is deemed unsuitable for transfer."*

Paragraphs 4.5.3 and 4.5.4 provide:

> *"4.5.3 Clinics must have procedures to verify the identity of those providing consent and to ensure the validity of the consent.*
>
> *4.5.4 Consent must be obtained in writing and documentation must include a signed statement by the treating clinician confirming that all relevant provision of information and counselling requirements have been satisfied …"*

If there were any doubt, paragraph 4.7.1 makes plain that a party can withdraw their consent from proceeding further:

> *"Clinics must recognise that, with the exception of some specific issues relating to the donation of gametes and embryos … individuals and couples have the right to withdraw or vary their consent for ART activities."*

At this point, I note that there is a difference of opinion by the clinics. One clinic, I will call clinic A, takes the view that a person who has contributed their eggs or sperm who then splits up from the other party and does not have control of the embryos is a donor. Other clinics, let's call them Clinic B, take the view that the person is not a donor, because at the time of the creation of the embryo the gamete provider was not a donor. The difference as to practical outcomes can be stark, as seen in Table 1.

**Table 1: differences between IVF clinics**

| Next steps | Clinic A: gamete provider is a donor | Clinic B: gamete provider is not a donor |
|---|---|---|
| Requirement for further counselling before implantation can occur | Required. | Not required. |
| Requirement for that party's consent to treatment (which can be withdrawn at any time) | Required. | Not required. |

Because a person who needs to consent to treatment can withdraw their consent at any time, and because of the nature of the consent that is required (including for attendance at counselling), if the embryo is stored at clinic A, then an order empowering a registrar to sign on behalf of a party[7] will be ineffective. If the gamete provider is not co-operative, then the likely course will be to export the embryos overseas to a jurisdiction where their consent is not required. This is turn requires clarity that the party is the only owner of the embryo, and state or territory law does not prevent the export.

However, if the embryo is stored at clinic B, then the gamete provider's consent to ongoing treatment is not required, and in the absence of that consent being withdrawn, treatment can occur at clinic B.

If the former partner is not a gamete provider, then their consent will not be required for treatment in either case.

Paragraph 7.4 provides:

> *"7.4.1 Clinics must have clear policies for managing disputes that may arise between individuals for whom an embryo is stored.*
>
> *7.4.2 When a dispute arises, a clinic may suspend the expiry of the period of storage specified in the consent form (see paragraph 4.6.4) at the request of either party. Such a suspension should be notified in writing to both parties and should be reviewed by the clinic every 5 years. Any subsequent discard of the embryos, without the consent of both parties, must be in accordance with the clinic's policy, which should have been clearly articulated to the responsible couple before the storage initially occurred (see paragraphs 4.2.6 and 7.6.)."*

It is clear, therefore, that further treatment using the embryo, such as the implantation of the embryo, in the absence of agreement between the parties or court order, cannot occur.

[7] *Family Law Act 1975* (Cth), s.106A.

## DIFFERENCES BETWEEN THE STATES

The current regulation of IVF clinics is seen in Table 2.

**Table 2: State regulation of IVF clinics**

| **Jurisdiction** | **Law** |
|---|---|
| **Australian Capital Territory** | *Assisted Reproductive Technology Act 2024* (ACT) |
| **New South Wales** | *Assisted Reproductive Technology Act 2007 (NSW)* |
| **Northern Territory** | No statute. An agreement between the NT government and the one IVF clinic is for the latter to comply as much as possible with South Australian requirements. |
| **Queensland** | *Assisted Reproductive Technology Act 2024* (Qld)- relevant provisions have not yet commenced, but are likely to commence in September 2025. |
| **South Australia** | *Assisted Reproductive Treatment Act 1988* (SA) |
| **Tasmania** | No statute |
| **Victoria** | *Assisted Reproductive Treatment Act 2008* (Vic) |
| **Western Australia** | *Human Reproductive Technology Act 1992* (WA). It is likely in March or April a government bill will be introduced to repeal and replace this Act. |

Where there is a conflict between a valid Commonwealth law and a valid State law, the State law gives way to the Commonwealth law to the extent of the inconsistency: *Commonwealth Constitution*, s.109.

As this area has not been tested on this point, it is unclear whether the Court might be prepared to make an order under the *Family Law Act 1975* (Cth) about who controls the embryo, that would appear to conflict with State legislation.

An example of the possible issue can be seen with the New South Wales Act. Let us assume that the wife proposes that an order is made by which she is to have sole ownership of the embryos.

Section 17(3) and (4) of the *Assisted Reproductive Technology Act 2007* (NSW) provides:

> *"A gamete provider may modify or revoke his or her consent by giving written notice, in the approved form (if any), of the modification or revocation of consent to:*
>
> *(a) the ART provider that obtained the gamete from the gamete provider,*
>
> *or*
>
> *(b) any ART provider that is, or has ever been, in possession of the gamete or embryo*

*to which the modification or revocation of consent relates.*

*(4) A consent may be modified or revoked at any time up until--*

*(a) in the case of a donated gamete--the gamete is placed in the body of a woman or an embryo is created using the gamete, or*

*(b) in the case of a gamete that is used to create a donated embryo--the embryo is implanted in the body of a woman, or*

*(c) in any other case--the gamete is placed in the body of a woman or an embryo created using the gamete is implanted in the body of a woman."* (emphasis added)

Once that revocation of consent has been given, then section 17B of that Act makes plain the role of an ART provider (subject to regulations, which are silent on this issue):

*"(1) An ART provider must not carry out any of the following activities in respect of a gamete or embryo (other than a donated gamete or donated embryo) unless the ART provider has taken the required steps, in accordance with this section, to obtain confirmation of the gamete provider's consent to the activity concerned:*

*(a) use the gamete to create an embryo outside the body of a woman,*

*(b) provide ART treatment to a woman using the gamete or embryo,*

*(c) supply the gamete or embryo to another person (including an ART provider),*

*(d) export, or cause to be exported, the gamete or embryo from this State.*

*Maximum penalty: 800 penalty units in the case of corporation or 400 penalty units in any other case."*

If the gamete provider has revoked consent, then I would consider it most unlikely that the court would compel the ability to use the embryo. Under the common law there is a right or freedom to reproduce or not to reproduce[8]. It is unclear what impact the right to privacy in the human rights jurisdictions of the ACT[9], Queensland and Victoria might have.

Cases decided in NSW have determined that the widow of a man who has died is the sole owner of sperm retrieved from his body. As such, although the NSW *ART Act* requires the clinic to obtain the gamete provider's written consent to use gametes, or to supply to another clinic or to export, she can do those things, as her rights are superior to those of the clinic[10]. Consistent with that approach, an order could be made under the *Family Law Act* 1975 (Cth)[11] empowering the party to cause the embryo to be exported to a place where the gamete provider's consent is not required.

[8] *Re Jane* [1988] FamCA 57; *F & F (Injunctions)* [1989] FamCA 41.
[9] *Human Rights Act 2004* (Act), s.12; *Human Rights Act 2019* (Qld), s.25; *Charter of Human Rights and Responsibilities Act 2008* (Vic), s.13.
[10] For example, *Re Edwards* [2011] NSWSC 478; *Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231.
[11] By way of injunction under s.114(1) or (3), or an order under s.80.

**EMBRYOS AS PROPERTY**

Property is defined relevantly in section 4(1) of the Family Law Act 1975 (Cth) as meaning:

> *"(a) in relation to the parties to a marriage or either of them – means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; …"*

In ***Clark v Macourt*** [2013] HCA 56, the High Court considered a *Hadley v Baxendale* case, being damages arising from the sale of an IVF clinic following the supply of non-compliant sperm. All the members of the High Court had no difficulty accepting that sperm was property. Keane J at [79] set out clause 18.1 of the deed of sale which relevantly said:

> *"Assets means the following assets of the vendor used in or attached to the Business:*
>
> *…*
>
> *(b) in the goodwill of the vendor in respect of the business, Records, Embryos (to the extent title in them can at law pass to the Purchaser) and Sperm but specifically excluding Plant & Equipment and any debts owed to the vendor in respect of the Business at completion."*

In ***Bazley v Wesley Monash IVF Pty Ltd*** [2010] QSC 118 Mr Bazley deposited a quantity of sperm with an IVF clinic at the time that he was diagnosed with cancer. He subsequently died. White J accepted the approach of the High Court in *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406 at [414] which concerned a case of detinue brought to recover possession of a preserved two-headed fetus. Griffiths CJ in dealing with an exception to the general common law principle of no right to possession of human corpse said:

> *"I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it is this, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it is has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances."*

Among the cases referred to by White J was *Yearworth v North Bristol NHS* [2009] EWCA Civ 37; [2010] QB 1, a decision of the Court of Appeal. A number of men supplied a quantity of sperm to their local IVF clinic where the sperm was stored and frozen. Subsequently the sperm was destroyed because it was thawed. The men sued the hospital. The court held that since the claimants had ownership of the sperm for the purposes of claims in negligence, they had sufficient rights in relation to it to render them capable of having been bailors of it.

In ***Roche v Douglas*** [2000] WASC 146; (2000) 22 WAR 331 a claim was brought concerning certain tissue of the testator that had been removed and stored from him prior to his death, for the purposes of making an order for DNA testing. Master Sanderson observed at 338 [24]:

> *"It defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken."*

The same could be said of embryos.

Justice White in *Bazley* held at [33]:

> *"The conclusion, both in law and in commonsense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and contact maintained, the respondent agreed to store the straws … furthermore, it must be implied into the contact of bailment, that the semen would, if requested, be returned in the manner in which it was held, which is preserved its essential characteristics as frozen semen capable of being used."*

Again, the same could be said about an embryo.

There has been a small number of cases where the question of whether or not embryos were property, in the context of property settlement under the *Family Law Act 1975* (Cth).

In ***A and B*** (1990) FLC 92-126 a couple was in dispute as to the use of frozen embryos after the breakdown of their marriage. The wife sought to use the embryos to become pregnant whereas the husband sought to have the embryos discarded. The outcome of the case in relation to the embryos is unknown as the case before the Court was to determine the wife's application to prevent the husband's solicitor from representing him due to a conflict of interest.

***G and G*** [2007] FCWA 80. *G and G* was primarily decided on the basis of Western Australian law. The significant feature in *G and G* was that the conditions of use meant that if the parties separated, then the embryo was to succumb. The wife wanted them to succumb. The husband wanted to donate them. The Court order enforced the terms of consent.

In an unreported decision in about 2011, a Federal Circuit Court judge in regional Victoria declined to hear an application concerning use of an embryo because it was held that the Court did not hold jurisdiction.

***Piccolo and Piccolo*** [2017] FCWA 167 concerned a second parenting journey. The husband and wife had a child conceived through surrogacy in Canada, although they lived in Western Australia. The embryo used was comprised of the husband's sperm and egg from a donor. Following the birth of the child, the parties separated. The husband wanted to proceed again. He had re-partnered with a relative of the wife. He wanted to use the embryo either for his partner to become pregnant or for a Canadian surrogate to be pregnant. Under the relevant Canadian law he was the only person who could decide the use of the embryo. The Court granted him an injunction so he could use the embryos.

*Piccolo* was a very helpful case, as it made plain that judicial relief could be obtained. However, *Piccolo* had limitations:

(a) The lawyers in the matter all came to the conclusion that embryos were not property. Therefore, the outcome was predictable- that the Court could not rely on its powers as to property settlement, but instead rely on its injunctive power.

(b) Because the case took the view that embryos were not property, this limited the relief available for unmarried couples. In all parts of Australia- except Western Australia- the ability of a former de facto partner to obtain an injunction is limited to that related to property[12]. Western Australia, alone of all the states, retains state law governing de facto property disputes.

(c) If parties reach agreement, then an application for consent orders is the usual method of seeking that agreement to be made in the form of orders. Those orders are made by registrars. Registrars do not have jurisdiction to make property injunctions. Therefore, further cost and delay has to be incurred by parties to have orders made.

In ***Selkirk & Selkirk*** [2018] FamCA 852, a female couple had separated. The terms of the consent form with the clinic were that in the breakdown of the relationship, the embryos were to be discarded. The judge declined to determine this issue on an interim basis:

> *"The determination of the dispute between the parties about any embryo with the respondent's DNA will require a decision on the force and effect of the parties' agreement about what is to happen to any stored embryos now that there is no issue that the parties have separated. I note the agreement makes no provision for what is to happen should there have been a clear separation and then at a later time a reconciliation such that the parties wish to have a stored embryo embedded.*
>
> *I decline to deal with this issue as should I decide in favour of the applicant then the embryos may be destroyed on the strength of an interim determination. In such circumstances the interim determination would be effectively a final decision."*

As far as can be determined, the matter was not determined on a final basis.

In ***Field & Story*** [2018] FamCA 1066 a transman, Mr Field, became pregnant (and later gave birth) with an embryo created from his egg and donor sperm. Further embryos were set aside and frozen. A consent order was made whereby the mother transferred "any right or interest" she may have had in the remaining embryos to the father:

> *" That the mother forthwith do all acts and things and sign all documents necessary to transfer to the father any right or interest she may have in the frozen embryos held in storage with the D Group and to notify the said fertility centre that with effect from the date of these Orders the father shall be the sole owner of the said embryos.*
>
> *That with effect from the date of these Orders, the father is to be solely responsible for all costs associated with the embryos, including but not limited to costs associated with their storage, transportation, renewal, use or disposal."*

In ***Canvil & Merle (No2)*** [2019] FamCA 685, the wife obtained an order enabling heer to authorise the disposal of the embryos. Hogan J stated:

> *"[160] Both children were conceived using in vitro fertilization. Some embryos remain in frozen storage. The husband and wife entered into a contract with BB Service Pty Ltd on 18 September 2008 for freezing and storage of embryos for a period of up to five years: that period expired on 18 September 2013. Despite this, BB Service advised that*

[12] *Family Law Act 1975* (Cth), s.114 (2A).

*it would continue to provide the freeze storage for the embryos until the finalisation of the proceedings. I accept it did so because the husband and the wife were unable to reach agreement about what was to happen with the remaining embryos.*

*[161] I accept that the wife informed BB Service on a number of occasions that she wanted them to cease providing the freeze service to the embryos, whereas the husband advised them not to do anything until the proceedings had been completed. I accept that, at least at one stage, his proposal was that the embryos be donated, a course with which the wife did not agree.*

*[162] I accept that the husband clearly regarded the embryos as F's siblings, because she was chosen from the same group of embryos.*

*[163] I note that, after being asked about its position, BB Service advised that, if a decision was made to empower the wife to provide the necessary notice to it to allow the thawing of the embryos - without the necessity of seeking that the husband provide any consent to that course - it would consider that it could comply with a subsequent direction coming from her alone.*

*[164] I consider it appropriate that the wife be authorised to act as the husband's agent in relation to the issue of the proposed thaw of the remaining frozen embryos; and that any person or facility be authorised to act on her sole request for the same. In that way, she will be able to authorise this, whilst the husband will not be required to agree to something which I accept he feels strongly emotionally about. In order to ensure that BB Service is not placed in a position of uncertainty, the husband will be restrained from providing written instructions to it seeking to prevent the entity from acting on any written instructions provided by the wife in relation to the cessation or termination of the freeze-storage of the remaining frozen embryos."*

Her Honour ordered:

*"(6) The wife (Ms Merle) is hereby appointed as the agent for the husband (Mr Canvil) in relation to any request for the cessation or termination of the freeze-storage or thaw of the frozen embryos and, by this Order, any person, organisation, corporate entity or authority is hereby authorised to act on the sole direction of Ms Merle in relation to such request.*

*(7) The husband (Mr Canvil) is hereby restrained and an injunction issue restraining him from providing further written instructions to BB Service to prevent that entity from acting on any written instructions provided by the wife (Ms Merle) by which she authorises the cessation or termination of the freeze-storage of the frozen embryos or otherwise consents to the thaw of the same."*

**CLEAR RECOGNITION AS PROPERTY IN 2024**

In ***Leena & Leena*** [2024] FedCFamC1F 135, there was a dispute between the husband and wife about the disposal of the embryos. The wife wanted to use them, but after the husband withdrew his consent under the *Assisted Reproductive Technology Act 2007* (NSW), she considered that approach futile, and wanted to be in charge of how they were disposed of. The husband opposed that.

Riethmuller J ruled that the embryos were property, and ordered that they be destroyed. His Honour stated:

> *"[35] While those storing embryos have their rights limited, the parties still enjoy a 'bundle" or "collection" of rights. The fact that the succumbed embryos are stored with a third party and that the provision of such storage services are limited to ART providers (which must be registered according to s 4 of the ART Act), does not deny the progenitors of property rights over the embryos. It is necessary that registered providers are involved in the process and this reliance on third parties does not dispel the rights afforded to gamete providers.*
>
> *[36] The rights afforded to the parties include the parties' entitlement to give consent to storage, to request directions be made with the stored embryos and dictate the period to which the embryos are stored. They also enjoy negative rights, such as forbidding their embryos being used in certain ways without their direction, such as implanting them, donating the embryos to other persons, or donating them to research. Under the ART Act, s 17 allows gamete providers to give, modify, or revoke their consent in relation to embryos. Section 25 provides that ART providers cannot store the embryos without the gamete provider's consent. While the ART providers have "obligations" under the ART Act, the gamete providers are the only ones with "rights" in relation to the embryos: the embryos are comprised of their genetic material, were produced and stored for their benefit, and the embryos cannot be used for implanting, donation, research, or otherwise, without their explicit consent. The "bundle of rights" that the parties can exercise indicate that the stored embryos are appropriately the subject of property rights.*
>
> *[37] The difficulty with property rights with respect to gametes and embryos is that they are deeply personal items, and an embryo (if viable) can grow to become a person. It is for this reason that many are reticent to conclude that property rights exist with respect to embryos. However, as a matter of law, an embryo is not a person with rights of its own. Under the Family Law Act 1975 (Cth), an embryo is not within the definition of a child: see Lee & Hutton [2013] FamCA 745; (2013) 50 Fam LR 322. Whilst property rights are most commonly associated with commercial trading between individuals, they are also the basis of many other legal protections. It is property rights that are often relied upon when proceedings are brought against ART clinics or those that interfere with tissues, as property rights most commonly provide a basis for suit against those who are not a party to a contract."*

Further:

> *"[39] Researchers have pointed out that people engaging in ART often do not reflect deeply upon what is to occur in the event of a separation. However, I note that in the present case, the particular clinic had counselling in place to support the parties and there was no claim that either party in this case had not reflected fully on the effect of the consent forms that they had signed.*
>
> *[40] Tissue and body parts are not consistently treated as being outside the ambit of property rights. Hair is property once cut from the person (hence wigs made with human hair can be bought and sold). However, dead bodies were not generally considered the subject of property rights unless a person has lawfully exercised work or skill when dealing with a body or a body part after which it can be the subject of property rights:*

*Doodeward v Spence [1908] HCA 45; (1908) 6 CLR 406 ("Doodeward"). However, the approach in Doodeward has been criticised for not providing a suitably nuanced test for contemporary application: see, for example, the discussion in Roger S. Magnusson, "The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions" [1992] MelbULawRw 5; (1992) 18 Melbourne University Law Review 601.*

*[41] Advances in medical science in the last 50 years have resulted in millions of human tissue items being held or stored both for research and treatment, necessitating the resolution of many disputes. Thus, many cases have concluded that sperm samples are subject to property rights for various purposes."*

His Honour stated:

*"[50] The legal rules for property rights are a system of legal regulation that provide for rights by a person against the world with respect to the subject matter of the property right. As property rights are a legal construct, it is the legal system that determines what can be the subject of property rights, and over the centuries this has altered. Property rights are not limited to items that are tradable or have a market value: for example, they are frequently relied upon to determine rights to items of significant emotional value with no resale worth such as wedding albums, a baby's sonogram, a child's first tooth, a keepsake from a trip, or a great grandmother's letters. By allowing a person property rights over an embryo, the law does not convert an embryo into something equivalent to a chattel but provides a suite of rights to those who have created the embryo. As with many property rights the law imposes considerable restrictions on the extent of those rights and how they may be exercised. Many restrictions appear in the ART legislation of the various states."*

His Honour then questioned whether a consent or contract had been entered into with the IVF clinic:

*"[56] If the agreements with the ART provider are considered as no more than mere consents, then it would not appear that there is a valid contract in place. Whilst the avoidance of legal language is attractive in this sphere, in the absence of contractual rights or property rights, it is difficult to see what rights, powers or remedies the providers of genetic material would hold. Clearly the law must provide some rights to those who have caused embryos to be created. Generally, those rights flow from the law concerning contract and property. Whilst most would consider that embryos are not to be treated like typical forms of property, recognition of property rights on the part of those causing embryos to be created provides a suite of important legal remedies, beyond contractual rights against those they have dealt with directly. At common law it is well recognised that some property rights can be restricted on the basis of public policy, which can easily be done to ensure that embryos are dealt with appropriately.*

*[57] Many of the overseas cases have simply enforced the contracts entered into by the parties. However, this apparently simple approach is also fraught for the same reasons that contracts are not enforceable with respect to children's issues, nor property cases (save in cases where the provisions relating to binding financial agreements have been complied with): such agreements can easily become inappropriate when events occur that were not contemplated at the time, largely because of the optimistic beliefs that most couples hold to the effect that they are not likely to separate. The issues are particularly difficult in the context of gametes and embryos: see, for example, Anita Stuhmcke et al,*

*"Use of Stored Embryos in IVF Following Separation or Death of a Partner" (2013) 20 Journal of Law and Medicine 773, and the facts in Evans. If the nature of an embryo is considered inappropriate to be the subject of property rights, as an embryo lies somewhere between a chattel and a human being, then leaving an embryo to a fate determined by contracts concerning its creation appears more objectionable than considering it the subject of property rights that are appropriately attenuated to recognise the unique nature of an embryo. Pursuant to the Act, a recognition of property rights would enable the Court to determine what orders are "just and equitable" with respect to an embryo, even if that differed from the contracts or consents of the parties, both for married and de facto couples.*

*[58] Although s 79 of the Act was drafted for the purpose of dealing with the more traditional subject matter of property rights, it is worded sufficiently broadly to enable appropriate regard to be paid to the special nature of embryos. The requirement that any order be "just and equitable" provides a suitable basis to attenuate property rights as may be appropriate in cases concerning embryos."*

Riethmuller J concluded that embryos were property:

*"[58] Although s 79 of the Act was drafted for the purpose of dealing with the more traditional subject matter of property rights, it is worded sufficiently broadly to enable appropriate regard to be paid to the special nature of embryos. The requirement that any order be "just and equitable" provides a suitable basis to attenuate property rights as may be appropriate in cases concerning embryos.*

***DETERMINATION***

*"[59] The embryos in this case were stored in 'straws'. The plastic straws are clearly "property". This aspect of cases concerning minute tissue samples led Master Sanderson in Roche, to say at [24]:*

*To deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.*

*[60] I approach the case on the basis that the plastic straws are of no market value, nor emotional value to any party. The straws only have value as the container for the embryo, and as such, the focus must be on the embryo and not the straw.*

*[61] The law as set out in Doodeward, which appears to remain the binding authority, at least with respect to the succumbed embryos, results in the embryos being "property" due to the work and skill utilised to extract and store them, placing them into straws. However, recognising the parties "collection of rights" over the embryos, it is appropriate to consider them the subject of property rights at common law. When categorising embryos for the purpose of the provisions of the Act which provides for children and property, the succumbed embryos are clearly not the former, and should not be excluded from the latter. In my view, the parties' rights with respect to embryos are property rights within the meaning of the term as it is used in s 79 and s 90SM of the Act. If I am wrong in concluding that viable embryos are the subject of property rights, I*

*am nonetheless persuaded that the viable embryos can be the subject of an injunctive order relying upon s 114 of the Act as the parties in this case were married.*

*[62] Both parties contributed their genetic material, the wife her ova and the husband his sperm. It is invasive and more emotionally exhausting to extract ova than it is to collect sperm. The wife made a larger contribution in this respect. The wife paid the fees to keep the embryos stored, therefore contributing financially, however this cost can be reflected in the final property proceedings which are pending. The embryos are the product of the bodies of each party and give rise to significant emotional issues for the parties, neither of which can continue to conceive naturally. The outcome (destruction or delivering the embryos to the wife) will have an emotional impact upon each of the parties. A relevant, but not decisive consideration, is the agreement of the parties reached at the time they caused the embryos to be created.*

*[63] Considering the matter as a whole, I am satisfied that partial property orders are appropriate to deal with this issue. I am not persuaded to make orders that the succumbed embryos be delivered up to the wife, nor would I have ordered that they be delivered up to the husband. I am satisfied that it is just and equitable that orders be made for the succumbed embryos to be destroyed, and I make orders accordingly."*

**CURRENT METHODS OF RESOLUTION**

If I have an embryo problem, how I do I resolve it by consent? As family lawyers, we are used to two ways of doing so:

- Consent orders; or
- Binding financial agreements.

Currently there are seven ways of resolving what is to be done with embryos, none of which is ideal:

1. **Have an order made** as to property settlement. It is now clear that this can be done. If consent orders are sought to be made by a Registrar, then case authority needs to be cited so that the Registrar has no doubt that they have jurisdiction to make orders. In the past, some Registrars have declined to make orders as they were of the view that they did not have jurisdiction. Sometimes, there is pushback from the other party, who is willing to have a deal done, but blanches at the idea that orders are required.

2. **Enter into a binding financial agreement**. I have seen this done concerning embryos. An issue with this approach is whether the BFA is going to cover all of the property, or just the embryos. Another issue is that both parties need to retain lawyers. Often, the other party will simply refuse to engage a lawyer, which then means this option is not available.

3. **Have an injunction made** so that one of the parties can use the embryos. This is per *Piccolo and Piccolo* [2017], discussed below. This can be made by consent by a Senior Judicial Registrar- clauses 11.2 and 11.3, Schedule 4, *Family Law Rules*. It may also be able to be made by a Judicial Registrar under clause 2.2, Schedule 4, if there is an order being made by consent: Part 10.2 *Family Law Rules*. It may be difficult to persuade a

registrar to make an injunction by consent in such a novel area. To commence proceedings now so that the matter can come straight before a judge is subject to a series of barriers with pre-action procedures. Of course, one could have an undertaking proffered instead of an injunction - but the difficulty with an undertaking is having it recognised by the IVF clinic. While this option is available, typically, it is the most expensive and slowest to obtain.

4. **Have one of the parties authorise the clinic** to provide treatment to the other parent and acknowledge that the embryos belong to the other. An authority is not accepted by some clinics - because it is not an agreement between the parties, and because of the obvious risk of fraud, or if it is accepted, there is a requirement for verification that the other party has signed it. Where the other party is not terribly interested in the embryos, and seemingly has some joy in stringing your client along, this can be hard to do, and take considerable time to achieve. Fraud and IVF have occurred or been alleged to occur in the past- for example:

    a) In **Munich**, where Inge forged her ex-husband Karl's signature to have IVF. She gave birth to two children - and he had to pay child support, despite being the victim of fraud[13].

    b) In **London**, where R and her partner ARB had a child through IVF. They then separated. R then forged ARB's signature to consent to IVF, resulting in the birth of a second child[14].

    c) In **Nottingham**, where a man alleged his ex forged his signature for IVF after they split up. He said he found out about the fraud when he was asked to pay child support, when the child was 18 months old[15].

    d) In **Abu Dhabi**, where it was alleged that the ex-wife forged her ex-husband's signature in a consent for an IVF clinic to conceive a child without his knowledge of consent[16].

    e) In **Perth**, where Megan Jane Hooper forged her estranged husband's consent in order to be become pregnant via IVF with previously frozen embryos[17].

5. **Have the parties execute statutory declarations** for the clinic that they consent to one of them being able to use the embryos. This is the favoured approach by one clinic. The benefit of mutual statutory declarations would reflect an oral or partly oral and partly written agreement entered into between the parties. Of course, statutory declarations are merely reflections of an agreement. While they are a step up from an authority, it may be difficult to show an agreement in place.

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[13] https://www.dailymail.co.uk/news/article-5687477/Ex-husband-ordered-pay-child-support-former-wife-forged-signature-undergo-IVF.html viewed 7 March 2022.
[14] https://www.theguardian.com/law/2018/dec/17/father-loses-damages-claim-over-forged-ivf-signature viewed 7 March, 2022.
[15] https://www.mirror.co.uk/news/uk-news/exclusive-woman-stole-my-sperm-to-have-ivf-340024 viewed 7 March 2022.
[16] https://www.bionews.org.uk/page_93804 viewed 7 March, 2022.
[17] https://www.heraldsun.com.au/news/national/woman-forges-exhusbands-signature-to-use-stored-embryo/news-story/c1a8078969ecc7a3bb0d029a5e5b551d viewed 7 March 2022.

6. **Have the parties enter into a written agreement** as to what can happen with the embryos. It is preferable that the agreement is witnessed, and in light of the solemnity and issues of consideration, that it is in the form a deed. This also reduces the risk of fraud. The agreement has the benefit of flexibility. The risk with an agreement is that if the parties have not resolved property settlement, then the terms of the agreement could be the subject of a contrary property settlement order under s.79 or s.90SM. However, if a party has willingly agreed to let embryos be controlled by the other party, presumably after the first party either had independent legal advice or was given the clear opportunity to obtain that independent legal advice, to obtain a subsequent order seeking to put the genie back in the bottle may prove very difficult. Often there may be a tight timetable with your client's fertility that might dictate that this speedy option is the one that is chosen.

7. **Convince the clinic that only one party, your client, owns the embryos.** This has arisen in a few cases of mine, where for one reason or another the parties never did a property settlement- and the limitation period has run out. There has been a lack of paperwork signed by the parties.

   In one case, my client alone paid for the ART, was the genetic mother, the time limit for property settlement had run out, and no consent forms for treatment had ever been signed. It seems that the last had occurred due to an oversight by the clinic.

   As a complication, my client had repartnered. She and her partner wanted to have a child together, but if they split up my client wanted some certainty that she alone would own the embryos. The clinic agreed that she was the sole owner of the embryos out of the old relationship and accepted the contract between the parties. The contract did not have the same status as a binding financial agreement or court order (as it was executed before there was clarity that embryos are property).

   In another case, the sole source of funding was by my client, who was the genetic mother. The time limit for property settlement had run out, but the consent form had been jointly signed. The clinic required verified authorisation of the other party, at the least. After the two of them had not spoken for about 3 years, my client managed to contact her former partner and obtain her verified consent, enabling my client use of the embryos.

Every case is different. There may be a benefit in option 6, despite the risks:

1. Have a specific written agreement in place, preferably in the form of a deed.

2. Ensure that your client is told clearly about issues of risk. This needs to be properly documented.

3. Ensure that the other party is told clearly about issues of risk. Again, properly documented. Although you do not owe a duty of care to the other side, they may decline to obtain independent legal advice, and may also later claim duress or some unconscionable conduct. By documenting clearly what they have been told, the risk of the deal falling apart later is reduced.

4. Ensure that the other party is told clearly to obtain independent legal advice. Again, properly documented.

5. Ensure that you send the agreement to the clinic - so that the clinic knows that solicitors have been involved, and if there are any issues for the clinics, these can be answered.

In appropriate cases, it may also be wise for the parties to attend a fertility counsellor, so that their expectations can be properly addressed, and documented.

**Bec and Sophie**

Bec and Sophie were living in a de facto relationship. They agreed to create a family, via IVF as their local IVF clinic, Wonderful IVF, with a clinic recruited (anonymous) sperm donor, using Bec's eggs.

One child, Ben, has been born. Sophie has applied to the Court to be able to relocate with Ben. This application is opposed by Bec.

Bec wants to become a mum again, using more of the embryos that are stored. Wonderful IVF refuses to provide treatment until an agreement or order is in place between Bec and Sophie. The agreement they signed with the clinic covers what is to happen if they died, but is silent about what happens if they separate.

In the midst of the litigation, Bec approaches Sophie to seek Sophie's agreement that Bec can use the embryos to become a mum again. Sophie at first refuses. Her concern is not that she would be a parent- but that because Bec would have a second child who is the half-sibling of Ben that this might tilt the scales that would prevent relocation of Ben to occur.

Bec and Sophie reach agreement that Bec can use the embryos in 2 ½ years time, when it is anticipated that the trial will have been held, and time for any appeal to have been heard with delivery of reasons. In other words, Bec can have treatment, but it should not potentially prejudice Sophie's chance at litigation.

## AVOID ENTANGLEMENT WITH THE PARENTAGE PRESUMPTIONS

The biggest worry for the men whose sperm has been used for these embryos that their estranged wives want to use, it seems, is the concern that they are the parents, and therefore liable for 18 years of child support. Experience has taught me that most men, once they learn that they will not be a parent of the child, are happy to relent ownership of the embryos.

On occasion, this has been done by writing a detailed letter taking their family lawyer through the various parentage presumptions, and demonstrating that the man is not (or with one basic protection, will not be) a parent.

It should be assumed that this letter will be read by both sides, and scrutinised accordingly. The pathway set out in the letter needs to be clear and meticulous.

That basic protection is to wait until one of two things have occurred:

- When the couple were a de facto couple, that greater than 40 weeks have passed since they separated before the woman can use the embryos; and

- When they were a married couple, that they have become divorced.

In each case, it is a case of avoiding the general parentage presumption that the man will be a parent of the resultant child.

In each case, there should be clear documentation that the man does not intend to be a parent of the child, such as a written agreement, so there is no factual finding that he is a parent[18].

In 2020, a client of mine filed an application in the Federal Circuit Court of Australia seeking, by way of consent, to have clarity about whether embryos were property. Judgment remains reserved. In that case I acted for the wife. There was one embryo which was composed of her egg and the husband's sperm. The husband consented to the wife having the use of the embryo.

The court ultimately made orders in 2023 allowing my client to own and use the embryo.

The court raised two issues of concern:

1. Whether in those circumstances the husband would be a parent.

2. Whether or not my client would be able to use the embryo following the making of an order.

Under the general parentage presumptions arising from marriage contained in section 69P of the *Family Law Act*, and in that case section 24 of the *Status of Children Act 1978* (Qld)[19] – each of which is a rebuttable presumption[20], there is a possibility that the husband in that case could be a parent. In my view, he would not have been a parent because under the *Family Law Act*, as he did not intend to be a parent.

The High Court in *Masson v Parsons* [2019] HCA 21 held that intention was an element in that case as to whether Mr Masson, the sperm donor, was a parent:

> *"To characterise the biological father of a child as a 'sperm donor' suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure."*[21]

If the *Status of Children Act* were otherwise to apply, the husband would not have consented to the fertilisation procedure and would not be a parent for the purposes of section 23 of that Act[22].

In the pending case, the husband made plain that he did not intend to be a parent. To be a parent under the *Family Law Act* one must be one of the following, as set out in **Table 3**.

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[18] Following the approach of the High Court in *Masson v Parsons* [2019] HCA 21.
[19] There are similar laws in each state and territory.
[20] Section 69U and section 29 respectively.
[21] At [54].
[22] There is conflicting case law in Queensland concerning section 23 of the *Status of Children Act 1978* (Qld). Differing case law in Queensland would mean that either: the husband would not be a parent for the purposes of section 23 of the *Status of Children Act* or, if he were a parent, he would have no rights or responsibilities, including as to child support.

**Table 3: *Family Law Act 1975* (Cth) parentage presumptions**

| Section of the *Family Law Act 1975* | Presumption |
|---|---|
| **s.69P** | man is presumed to be a parent arising from marriage |
| **s.69Q** | man is presumed to be a parent arising from cohabitation with a woman |
| **s.69R** | the person consents to their name being entered onto a birth register held in Australia or a prescribed overseas jurisdiction that they are a parent |
| **s.69S** | the court has found that they are a parent |
| **s.69T** | they have executed acknowledgement of paternity |
| **s.4** | the child has been adopted by the person |
| **s.60H(1)** | they were living in a de facto relationship or marriage at the time of an artificial conception procedure being undertaken and consented to that artificial conception procedure, by which they are both the parents and any person who provided genetic material is not |
| **s.60H(2)** | birth mother |
| **s.60HB** | they are a parent by virtue of an Australian surrogacy parentage order |
| **N/A** | In the contemporary Australian understanding of who is a parent, as a matter of fact they are a parent: *Masson v Parsons* [2019] HCA 21 |

**Each of the States and Territories have similar provisions, which need to be checked in each case.**

Thus, to avoid being entangled by the parentage presumptions, where the man's DNA was used to create the embryo and the woman is seeking to use the embryo, then treatment should only commence after the parties are divorced (if they were married) or after 44 weeks after final separation (if they were in a de facto relationship). It is best that there is a clear statement by a man in that situation that he does not intend to be a parent. That would be provided by an order or a well drafted agreement.

So far as lesbian couples are concerned, if they have separated, then the former partner or wife (assuming it is not her DNA) will not be a parent of any child who is born because she will not be consenting to treatment occurring (which is a requirement of section 60H(1) of the *Family Law Act* to make her a parent). In this respect, the requirements under the *Ethical Guidelines* for consent to specific treatment are essential. If she hasn't consented to that treatment, she cannot be a parent (unless she falls within those categories described above). However, consent may be wider than that[23].

[23] *S (Children: Parentage and Jurisdiction)* [2023] EWCA Civ 897.

## COULD THE WIFE USE THE EMBRYO?

In the case decided in 2023, the clinic in which the embryo was stored took the view that the husband would be converted from being a partner in the process to a donor. This is not a universal view of other clinics – some take the view that when the embryo was created, he was not a donor, and therefore does not become a donor now.

The reason that that view is significant is that if the order is made to enable the use of the embryo and the husband is considered by the clinic to be a donor, then treatment could only occur at that clinic if he consents to treatment and undertakes counselling. No order from the court could force him to do those.

The alternative is to move the embryo to another clinic (within Australia or overseas) whereby his consent is not required

## ESTATE PLANNING

In *Wickham and Toledano* [2022] FedCFamC1F 32 a will was executed by a single woman which provided that in the event of her death and she had a partner, the partner was to decide the disposition of the embryos, but if she did not have a partner then a specified family member was to decide the disposition of the embryos.

Despite the will making clear reference to embryos, it did not make any provision for the appointment of a testamentary guardian of any child of the testator.

The woman had a brief, turbulent relationship with another woman. They consented to implantation. They quickly broke up. When the woman gave birth, she was single. Three days later she died.

The birth mother's sister and sister-in-law then had to commence proceedings under the *Family Law Act* to ensure that the children were lawfully in their care after being discharged from hospital because there was the possibility at least that the former partner was a parent, and due to the gap in the Will, there had been no appointment of a testamentary guardian – so a court order was required. Hundreds of thousands of dollars were spent on those proceedings, which *might* have been avoided if the Will had specified the appointment of a testamentary guardian – a clear oversight by the solicitor who prepared the Will.[24]

## INTERNATIONAL CASES

Sometimes, an order might be made in one jurisdiction affecting embryos stored in another jurisdiction. I give the example of a recent case.

> Godfrey and Julia were a married couple in Singapore. Julia had obtained a divorce order. Before that order issued, however, there was a hold up. She had wanted an order that enabled her to own the jointly held embryos stored in a Queensland clinic. Initially, the husband did not oppose the order. He had no interest in the embryos. However, he realised that he might be a parent, and therefore liable for child support and child maintenance.

[24] I acted for the sister and sister-in-law. I did not prepare the Will.

I was asked to provide an opinion, commissioned by the wife, but viewed by both parties about:

1. Whether the Singapore order could be registered in Queensland.

2. Whether the husband would be a parent.

3. Whether the husband would be liable to pay child support or child maintenance.

The simple answer is that the order could be registered, that the husband would not be a parent in Australia, even though he was genetically a parent, and therefore he would not be liable in Australia to pay child support or child maintenance.

Through an exhaustive process, courtesy of a federal system, I was able to determine that the order could be registered under the *Uniform Civil Procedure Rules* with the Supreme Court of Queensland.

As the parties would be divorced before the child is born, then the husband would not be a parent under the parentage presumption under the *Family Law Act 1975* (Cth), or its state equivalent, the *Status of Children Act 1978* (Qld).

Although the genetic material was being supplied to the wife to use, it was being supplied on the express or implied understanding, as per Masson v Parsons, that he was not to have anything to do with the child. Therefore, he was not a parent under Australian law.

Therefore, under Australian law he was not liable to pay child support, child maintenance or child bearing expenses.

Whether he was a parent or liable for child support or child maintenance under Singapore law was outside my expertise.

Shortly afterwards, the husband agreed to the divorce order being made, and executed all necessary consents to enable the wife to use the embryos.

**FINALLY**

The use of embryos after relationships break down is a common problem. With good will, embryos can be used now. Often when the other party is reassured in an open, authoritative way that they will not become a parent, then agreement can be reached for use of the embryos.

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